81-2254

No._____

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In the Supreme Court of the United States

October Term, 1981

STATE OF NORTH DAKOTA

Respondent,

vs.

RALPH H. GELVIN

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

ROBERT J. SNYDER
Attorney for Petitioner
P.O. Box 2071
Bismarck, North Dakota 58502
701-258-1611

QUESTION PRESENTED

Whether the North Dakota Supreme Court erred as a matter of law, to the prejudice of Ralph H. Gelvin, in reversing the trial court's Order suppressing as evidence a certain alleged illegal substance, seized from the defendant's wallet during a warrantless jailhouse inventory search thereof, thereby denying Ralph H. Gelvin of his constitutional right against unreasonable searches and seizures, pursuant to the Fourth Amendment to the Constitution of the United States?

PARTIES

All parties to this proceeding are set forth in the caption hereof.

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No._____

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STATE OF NORTH DAKOTA

Respondent,

vs.

RALPH H. GELVIN

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

TO THE HONORABLE: The Chief Justice and Associate Justices of the Supreme Court of the United States.

Ralph H. Gelvin, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Dakota entered into the above-entitled case on April 21, 1982.

OPINIONS BELOW

The Supreme Court of North Dakota having issued an Opinion in this case, a copy of which appears in Appendix A to this Petition at pages A8 to A19. The Opinion is officially reported at N.D., N.W.2d .

JURISDICTION

The Opinion of the Supreme Court of the State of North Dakota (Appendix A, pages A8 to A19) was entered on April 21, 1982. A timely Petition for Rehearing was denied on April 29, 1982. The jurisdiction of the United States Supreme Court is invoked pursuant to this Court's ability to review and decide any title, right, privilege or immunity specically set up or claimed under the Constitution of the United States. 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched. and the persons and things to be seized."

The Fourth Amendment to the Constitution of the United States is applied to the States through Article Fourteen, Section One, of the Constitution of the United States, which provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

During the early morning hours of April 2, 1981, officer Cliff Emmert of the Bismarck, North Dakota, Police Department, received a report of an incident at the apartment of one Shirley Hart in the City of Bismarck, North Dakota. Responding to the call, Officer Emmert observed Mrs. Hart lying on the floor in the hallway of the apartment, apparently in a semiconscious condition. He also observed Ralph H. Gelvin lying on the floor of the kitchen of the apartment in a similar condition.

Officer Emmert received information from Mrs. Hart and her two sons that Gelvin, whom Mrs. Hart knew, had come to the apartment uninvited, was acting strangely, claimed to be "on acid" and had waived a small piece of paper in the air, claiming it was LSD. Further, the officer was informed that the piece of paper had been placed in Gelvin's wallet. Officer Emmert was also informed that Gelvin had assaulted Mrs. Hart and torn her telephone off the wall.

Believing under the total circumstances of the situation that he did not have sufficient grounds to make an arrest on any charge, Officer Emmert took Gelvin into custody and transported him to the Burleigh County, North Dakota, jail

for the purpose of non-criminal detoxification. At no time prior to taking Gelvin to the jail did he place Gelvin under arrest.

At the jail, Gelvin's belongings were taken from him and a jailhouse inventory search was conducted. During that search, Officer Emmert thoroughly examined Gelvin's wallet, and in it found a small piece of paper with a design of the cartoon character "Goofy". This piece of paper was seized by Officer Emmert, and subsequent chemical testing of it showed that it contained LSD.

On April 27, 1981, Gelvin was charged with possession of a controlled substance, namely Lysergic Acid Diethylamide (LSD), a Class C Felony under the laws of the State of North Dakota. A preliminary hearing was held on May 19, 1981, and Gelvin was bound over to District Court. Gelvin was arraigned and an Information filed on June 1, 1981.

On June 22, 1981, Gelvin filed with the District Court a Motion to Suppress the alleged LSD, on the grounds that the search of Gelvin's wallet and the seizure of the piece of paper was unlawful pursuant to the provisions of the Fourth Amendment of the United States Constitution. On August 11, 1981, the Honorable Gerald G. Glaser, Judge of the District Court, granted Gelvin's motion and suppressed as evidence the alleged LSD. A copy of the Memorandum Opinion and Order granting Gelvin's Motion to Suppress appears in the attached Appendix at pages A1 to A7.

On August 17, 1981, the State of North Dakota filed with the District Court a Notice of Appeal, appealing the Memorandum Opinion and Order of Suppression to the Supreme Court of the State of North Dakota. On April 21, 1982, following briefs and oral argument, the North Dakota Supreme Court entered judgment reversing the Order of Suppression of the trial court. One of the primary issues

argued before the North Dakota Supreme Court was whether or not the search of Gelvin's wallet and the seizure of the paper therein constituted an unreasonable search and seizure pursuant to the terms of the Fourth Amendment to the United States Constitution.

On April 29, 1982, Gelvin timely petitioned the North Dakota Supreme Court for a rehearing, again raising the issue of the reasonableness of the search and seizure in this case. On April 29, 1982, said Petition for Rehearing was denied. A copy of said denial appears at Appendix page A20.

On May 5, 1982, Gelvin was granted an extension of Stay of Mandate for a period of 30 days, for the purpose of petitioning the United States Supreme Court for a Writ of Certiorari.

Gelvin now petitions the Supreme Court of the United States of America for a Writ of Certiorari to the Supreme Court of the State of North Dakota, reviewing the Judgment of Reversal entered by the Supreme Court of the State of North Dakota on April 21, 1982.

REASONS FOR GRANTING WRIT

I. CONSIDERABLE CONFLICT AND CONFUSION EXISTS BETWEEN THE STATES AND THE FEDERAL CIRCUITS AS TO THE NATURE AND SCOPE OF THE JAILHOUSE INVENTORY SEARCH EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT.

The specific facts of this case involve the search of a detainee's wallet at a jail pursuant to the so-called "inventory search" exception to the warrant requirement of the Fourth Amendment. The United States Supreme Court has approved the concept of this exception in the often-quoted case

of South Dakota v Opperman, 428 U.S. 364, (1976). Opperman clearly dilineated the rationale for the inventory search exception. It is as follows, 428 U.S. 364, 369:

1. Protection of the detainee's property while it remains in police custody.
2. Protection of the police against claims and disputes over lost and stolen property.
3. Protection of the police from danger.

The rationale for the inventory search is far different from the rationale for the so-called "search incident to arrest" exception to the warrant requirement, which is at least partly investigatory in nature, while the inventory search supposedly is not. See South Dakota v Opperman, supra, and Kaufman v United States, 453 F.2d 798 (8th Cir. 1971). However, as will be seen, it is submitted that there is conflict between the states, and the Federal Circuits, as to the scope of such an inventory search, and also confusion among the States, and the Federal Circuits, as to whether a given search is, in fact, an inventory search or a search incident to an arrest.

It should be noted at the outset that, in this case, Gelvin was brought to the Burleigh County Jail for the purpose of detoxification. Under North Dakota law, when a person is detained for such detoxification he is not under arrest. Indeed, as the North Dakota Supreme Court states in its opinion in this case, at Appendix page A11:

> Initially, we note that Gelvin was brought to the Burleigh County Jail for detoxification; he had not been placed under arrest at the time his possessions were inventoried at the jail. Therefore, the search in this case cannot be justified as a search incident to an arrest.

Therefore, in this case we are faced with the somewhat extraordinary situation of a "pure" inventory search, and one which is not tainted with elements of a search incident to an arrest, since there was no arrest.

It is submitted that conflict exists between the various states as to the scope of a search conducted pursuant to the inventory search exception to the warrant requirement. For example, the State of Michigan is very liberal as to the scope of such a search. See People v Walker, 228 NW 2d 443 (Mich. 1975); and People v Brooks, 274 NW 2d 430 (Mich. 1979).

This liberal scope of search also appears to be the rule in the State of Indiana. See Dearing v State, 393 NE 2d 167 (Ind. 1979).

Although neither state has ruled specifically on the question of a search of a wallet, it would appear that should such a situation arise before these courts, the search would be allowed.

On the other hand, a number of states are very restrictive in the scope of the search allowed under the inventory search exception. Foremost among these is the State of Alaska. See Reeves v State, 599 P.2d 727 (Alk. 1979); and Lyle v State, 600 P.2d 1357 (Alk. 1979.)

The State of Illinois is also very restrictive in the scope of such a search. See People v Redmond, 390 NE 2d 1364 (Ill. 1st Dist. 1979); and People v Bayles, 411 NE 2d 1346 (Ill. 1980).

The State of North Carolina is also very restrictive in the scope of its inventory searches. See State v Hall, 279 SE 2d 111 (N.C. App. 1981).

The State of Hawaii is also particularly restrictive in the scope allowed in inventory searches. See State v Kaluna,

520 P.2d 51 (Hawaii 1974).

These states have also not had occassion to deal with a wallet as the particular container involved in an inventory search. However, it is submitted that, given the reasoning in these cases, a search of a wallet, such as in the present case, would not be allowed.

Further, a number of states appear completely confused as to whether or not a given search is, in fact, justified under the inventory search exception or under the search incident to arrest exception. The Supreme Courts of these states will begin discussing a given search in terms of an inventory search, and end up justifying it on the basis of a search incident to an arrest. The State of Minnesota is such an example. See State v Scroggins 210 NW 2d 55 (Minn. 1973).

The State of Wisconsin has similarily confused the two exceptions to the warrant requirement. See State v Mabra, 213 NW 2d 545 (Wis. 1974); and State v Mordeszewski 229 NW 2d 642 (Wis. 1975).

The Supreme Court of North Dakota, while ruling in this case on a search conducted strictly under the inventory search exception, in its opinion in this case, attached in the Appendix hereto, justifies its reasoning by citing a number of cases, almost all of which were not decided on the basis of an inventory search, but which were decided on the basis of a search incident to arrest, or on grounds other than a strict inventory search. See Appendix page A13.

A similar situation would appear to exist within the Federal Circuits. For example, the Eighth Circuit in the case of United States v Bloomfield, 594 F.2d 1200 (8th Cir. 1979), held that an inventory search can be applied to any container not securely closed. As the Court states, at 594 F.2d 1200, 1203:

> In conclusion, we note that our holding that the knapsack should have been inventoried as a unit rather than opened and itemized is confined to the facts before us. If a container which is to be inventoried is not securely closed so that the articles within could possibly fall out, it may be wiser for police to itemize the articles. See United States v Newman, 585 F.2d 355 (8th Cir. 1978).

On the other hand, the Ninth Circuit, in the recent case of United States v Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981), held that a purse could not be searched during the course of a routine inventory search. As the court states at 662 F.2d 1285, 1290:

> Although we recognize that there is a fine line between the wallet on the person and a purse within the arrestee's control, we hold that possessions within an arrestee's immediate control have Fourth Amendment protection at the station house, unless the possession can be characterized as an element of the clothing or another exception to the Fourth Amendment requirement applies.

It is therefore submitted that an obvious conflict exists between at least the Eighth and Ninth Circuits as to the scope of an inventory search for an item such as a purse, in that the Ninth Circuit specifically prohibited it, while the Eight Circuit would presumably allow it.

It is also interesting to note that the Ninth Circuit in United States v Monclavo-Cruz, supra, tacitly authorized the search of a wallet. However, this dicta allowing the search of a wallet in United States v Monclavo-Cruz, supra, which dealt exclusively in terms of an inventory search, was based entirely upon a prior Ninth Circuit case, United States v Passano, 624 F.2d 938 (9th Cir. 1980), which dealt exclusively in terms of a search incident to an arrest. It

would thus appear that the Ninth Circuit, like the States of Minnesota and Wisconsin, has trouble differentiating between an inventory search and a search incident to an arrest.

In sum, it is submitted that considerable confusion exists, both in the states and the Federal Circuits, as to not only the scope of the inventory search exception to the warrent requirement, but to whether or not a given search is, in fact, a search incident to an arrest or an inventory search. It is further submitted that the present case offers the United States Supreme Court an excellent opportunity to resolve this confusion and conflict, especially in view of the fact that an item such as a wallet is the container at issue here, and the fact that this case presents a situation of a "pure" inventory search without the possibly-confusing element of a search incident to an arrest.

II. THE INVENTORY SEARCH OF GELVIN'S WALLET AND THE SEIZURE OF THE ALLEGED CONTROLLED SUBSTANCE THEREIN, WAS AN UNREASONABLE SEARCH AND SEIZURE PURSUANT TO THE PROVISIONS OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The principle of the inventory search was first set forth by the United States Supreme Court in the case of South Dakota v Opperman, supra. As has been discussed, the grounds for such an inventory search are three-fold:

1. Protection of the detainee's property while it remains in police custody.

2. Protection of the police against claims and disputes over loss and stolen property.

3. Protection of the police from danger.

It is undisputed that jailers must have such a device in order to effectively run jails. However, the scope of such a search remains in very large dispute.

In the opinion of the undersigned, the most well-reasoned discussion of both the justification and rationale for the inventory search, and its scope, can be found in the case of Reeves v State 599 P.2d 727 (Alk. 1979). As the Reeves court states, at 599 P.2d 727, 735:

> There are two valid justifications for allowing a pre-incarceration inventory search exception to the warrant requirement. The first is the institutional interest in prohibiting the introduction of weapons, illegal drugs, and other contraband or potentially dangerous items into the jail environment. The second is the protection of the arrestee's property and the related interest of the jail administration in protecting itself against claims of loss or damage to that property occurred while the property was under the control of jail authorities . . . To this end, [jail authorities] may require internees to surrender any possible repositories for such items prior to incarceration. However, a concomitant of this wide authority to prohibit the entry of personal belongings which may harbor forbidden contents is a complete absence of authority to conduct a general exploratory search of the belongings themselves. This absence of authority derives from the lack of any justification for such a further search inherent in the exception itself. Once the internee has turned over his possessions for safekeeping it is no longer possible that he may take them into jail. Thus, correctional officers may conduct a reasonable search of an arrestee's person for this reason, but may not further search the arrestee's possessions discovered and removed in that search in the absence of a warrant or circumstances which

provide the basis for a more intensive search under another recognized exception to the warrant requirement.

Concerning the second related justification, that of the protection of the arrestee's property and guarding against false claims, the Reeves court reasoned as follows, at 599 P.2d 727, 735-737:

> The State can also be fairly and reasonably protected from claims of loss or damage to an arrestee's property in its possession without an intensive exploratory pre-incarceration search. As we noted in our recent opinion in State v Daniel, 589 P.2d 408, 415 (Alk. 1979) the State, as an involuntary bailee, has "only a 'slight' duty of care" with respect to property in its possession because of the arrest of the property owner and this "duty could easily be met without extensive inventory". The State can effectively insulate itself against fraudulent claims by simply listing by description any items of property taken from an arrestee; securing these items in a property bag or other secure storage container used in the facility, preferably in the arrestee's presence; and obtaining the arrestee's signature acknowledging the correctness of the inventory so taken. If there is any question as to the contents of any container, the arrestee should be "consulted and offered the opportunity to request that an inventory be made of the contents" of such containers. We think the above procedure and limited search fairly and reasonably protects the State against fraudulent claims
>
> . . .

It is submitted that the above reasoning is extremely clear and succinct, and applies directly the case at bar. Gelvin's wallet had already been seized by the jail authorities, and

therefore could not cause any trouble in the jail. Further, the jail, as a "involuntary bailee" had only a slight duty of care concerning the wallet, and could very easily have protected itself against spurious claims by taping the wallet shut and putting it in a locker. No exigent circumstances existed for the searching of the wallet, and if the State had wished to search it a warrant could easily have been obtained.

As has been discussed, South Dakota v Opperman, supra, established the principle of a justification for the inventory search of an automobile. However, subsequent United States Supreme Court decisions greatly refined the scope of any such inventory search.

In United States vs Chadwick, 433 U.S. 1 (1977), a sharp distinction was drawn between the inventory search of an automobile, as allowed in South Dakota vs Operman, supra, and a footlocker taken from an automobile. Chadwick drew this distinction using basically the same reasoning as appears quoted above from State v Reeves, supra.

In Arkansas v Sanders, 442 U.S. 753 (1979), the United States Supreme Court drew an even a sharper distinction, holding that the prohibition against searching footlockers removed from automobiles extended to all luggage taken from automobiles.

The main consideration in deciding whether or not a certain container can be searched depends on whether or not an individual has an expectation of privacy for the contents of the container. The United States Supreme Court has determined that an expectation of privacy does exist for the contents of a footlocker, and of luggage. See United States v Chadwick, supra, and Arkansas v Sanders, supra. One primary question in this case is whether an expectation of privacy exists for the contents of a wallet.

In United States v Monclavo-Cruz, supra, the Eighth Circuit had occasion to discuss whether or not an expectation of privacy exists with relation to a purse, 662 F.2d 1285, 1287:

> . . . it is beyond doubt that society recognizes that an expectation of privacy in purses is reasonable.

It is submitted that an expectation of privacy no less exists with a wallet than a purse, and that, in fact, a greater expectation of privacy exists with relation to a wallet than with luggage.

To the best knowledge of the undersigned, the United States Supreme Court has never decided whether or not an expectation of privacy exists as to the contents of a wallet, and whether or not a jailhouse inventory search can be extended to searching the contents of a wallet.

However, it is submitted that with its decisions in United States v Chadwick, supra, and Arkansas v Sanders, supra, the United States Supreme Court is developing an evolving body of law concerning inventory searches which exactly coincides with the arguments put forth by Gelvin in this case. It is therefore requested that the United States Supreme Court undertake review of this case, and extend the prohibition as set forth in United States v Chadwick, supra, from the luggage therein to the wallet in the present case, as being an unreasonable search and seizure pursuant to the Fourth Amendment to the Constitution of the United States.

CONCLUSION

It is submitted that considerable confusion exists among the various state courts as to the scope of jailhouse inventory searches, with some states having a very limited scope of search, some states having a very liberal scope of search, and some states being very confused as to whether a given search is an inventory search or a search incident to arrest. The same type of conflict and confusion would also appear to exist in at least two of the Federal Circuits. It is further submitted that this conflict and confusion is widespread to the point where only a decision by the United States Supreme Court will serve to provide definite direction in the matter.

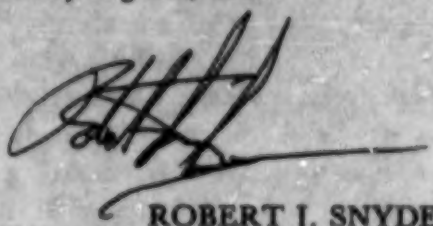
It is further submitted that, given the rationale for the inventory search exception to the warrant requirement, an inventory search should not extend to the contents of a container such as a wallet, and that the better-reasoned decisions so limit the search. Further, it is submitted that the United States Supreme Court, with its decisions in United States v Chadwick, supra, and Arkansas v Sanders, supra, is developing a body of law concerning inventory searches which prohibits searching articles carrying with them an expectation of privacy unless a warrant is first obtained, or exigent circumstances are present.

Finally, it is submitted that this is the proper case in which to settle the matter of the scope of inventory searches of articles taken from the person of a detainee, in that this case involves the rather extraordinary situation of a person searched at a jail who was not brought there under arrest, therefore removing the possibly-confusing element of a search incident to an arrest.

For the reasons stated above and the cases cited within the

body of this Petition and in the Conclusion, the Petitioner respectfully prays that a Writ of Certiorari be granted.

Dated this 2nd day of June, 1982.



ROBERT J. SNYDER

219½ East Broadway
P.O. Box 2071
Bismarck, North Dakota 58501
Phone: 701-258-1611